IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 28 OF 2006

SHRI AVELINE J. PINTO, MAPUSA GOA. ....Petitioner

Versus

STATE OF GOA THROUGH CID POLICE AT PANJIM ....Respondent

Mr. T. George John, Advocate under Legal Aid Scheme for the Petitioner.
Ms. W. Coutinho, Public Prosecutor for the Respondent.

Coram:- N. A. BRITTO, J.

Date:- 21st December, 2006

P.C.:-

Heard Mr. T. George John, the learned Counsel on behalf of the petitioner, and Ms. Winnie Coutinho, the learned Public Prosecutor on behalf of the respondent.

The petition filed on behalf of the petitioner/accused can be dealt with as a revision petition filed against Order dated 20-7-2006 of the learned Adhoc Additional Sessions Judge, Panaji by which the learned Additional Sessions Judge has directed framing of the charge against the accused under Sections 376, 354, 506(ii) r/w 34 I.P.C. In fact, the learned Additional Sessions Judge ought to have directed the framing of charge under Section 376 r/w 511, 354 and 506(ii) I.P.C.

The case against the accused came to be investigated by Crime Branch of the C.I.D. at Panaji upon a complaint filed by the victim girl, aged about 13 years who at the relevant time used to sell plastic bags in Mapusa fish market. The said complaint came to be filed on 16-10-2003 in respect of an incident which had taken place a year prior to that.

I have perused the said complaint and so also the report of medical examination of the said victim dated 16-10-2003. The said complaint when read as a whole does indicate that the accused attempted to commit rape upon her and the said medical report shows that the said attempt was

unsuccessful in that the Medical Officer found that there was no evidence of sexual intercourse with the said victim.

As per the allegations made by the said victim there were four of them who were called by the accused, she having been called last. After the incident, the victim went home and slept and when she was questioned by her mother, she did not narrate to her about the incident but told her that she had a headache. After the complaint was recorded the victim was examined by the said Medical Officer but the accused was not. There is no dispute at present that the accused was examined earlier on 11-10-2003 in connection with another case and the said report had shown that there was no evidence of recent sexual intercourse. At the same time, the said medical report had also shown that upon physical and genital examination of the accused there was nothing to suggest that the accused was incapable of sexual intercourse.

Mr. T. George John, the learned Counsel on behalf of the accused has submitted that a false complaint has been filed with delay against the accused and the delay being of a year, the complaint filed against the accused by the said victim is unbelievable. Learned Counsel further submits that the charge-sheet in the case was also filed with delay. It is further submitted that when the accused was in judicial custody, he was examined and at that time he was found that he was incapable of performing sexual intercourse. Learned Counsel therefore submits that all these facts would indicate that a false case has been filed against the accused.

Learned Counsel on behalf of the accused has placed reliance on the case of State of Orissa v. Debendra Nath Padhi(AIR 2005 SC 359), Dilawar Babu Kurane v. State of Maharashtra(AIR 2002 SC 564) and State of M. P. v. S.B.Johari and others(AIR 2000 SC 665).

The parameters required to be applied at the stage of framing of charge are now well settled with several decisions of the Apex Court. In the case of State of Maharashtra and another v. Som Nath Thapa and others((1996) 4 SCC 659), the Honb'ble Supreme Court, speaking through three learned Judges, stated that at that stage, the Court is required to consider the question of framing of charge by applying the test of a prima

facie case and that a more clear statement of the law would be that if there are grounds for presuming that the accused has committed the offence, a Court can justifiably say that a prima facie case against him exists and so frame a charge against him for committing that offence and that the Court on the basis of material on record should come to the conclusion that the commission of the offence is a probable consequence and if that is the case, a case for framing of charge exists. To put it differently, observed the Supreme Court, that if the Court were to think that the accused might have committed the offence, it can frame charge, though for conviction the conclusion is required to be that the accused has committed the offence and at the stage of charge, the probative value of the materials cannot be gone into and the materials brought on record by the prosecution have got to be accepted as true at that stage.

Again, the Apex Court in the case of State of M.P. v. S. B. Johari and others(supra) has stated that a charge could be quashed if the evidence which the prosecutor proposes to prove the guilt of the accused, even if fully accepted, cannot show that the accused committed the particular offence. In such case there would be no sufficient ground for proceeding with the trial. Referring to the case of Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjayya(AIR 1990 SC 1962/1990 Cri.L.J. 1869), the Apex Court observed that at the stage of framing the charge inquiry must necessarily be limited to decide if the facts emerging from such materials constitute the offence with which the accused could be charged. The Court will peruse the records for that limited purpose, but it is not required to marshal with a view to decide the reliability thereof. Referring to another case of Superintendent and Remembrancer of Legal Affairs v. Anil Kumar Bhunja and others(AIR 1980 SC 52/1979 Cri.L.J. 1390) the Apex Court observed that "it seems well settled that at the stage of Sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if

it is opposed to common sense or the broad probabilities of the case.

The aspect of delay in filing the complaint against the accused could be explained by the prosecution at the trial but delay at the most can affect the credibility of the said complaint but that is a matter for the purpose of appreciation of evidence, which cannot be considered at this stage for the Court is required at this stage to take the statements in the complaint at their face value i.e. that they are true. Whether the accused was sexually impotent or not may also not be relevant for the purposes of an attempt to commit rape. The accused could have attempted but failed. In any event, it must be observed that this is again a matter which may be required to be gone into at the trial stage of appreciation of evidence. Suffice it to observe that the complaint of the said victim girl, prima facie, discloses that the accused did attempt to commit the offence of rape which is punishable under Sections 376 r/w 511 I.P.C. but that he could not succeed for some reason or other is a different matter. The said complaint also discloses offences punishable under Sections 354, 506(ii) I.P.C.

In my view, there is no merit in this revision and consequently the same is hereby dismissed.

The accused to appear before the trial Court on 22-1-2007 at 10.00 a.m.

N. A. BRITTO, J.

RD.